93-496

No. 93-

In the Supreme Court of the United States

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF OREGON, by and through its Department of Parks and Recreation,

Respondents.

VOLUME I
APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF OREGON

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VOLUME I

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Irving C. and Jeanette STEVENS,
Petitioners on Review,

v.

CITY OF CANNON BEACH
and State of Oregon,
Department of Parks & Recreation,
Respondents on Review.

(CC 90-2061; CA A68916; SC S39585)

In Banc

On review from the Court of Appeals.*

Argued and submitted March 3, 1993.

Garry P. McMurry, of Garry P. McMurry & Associates, Portland, argued the cause and filed the petition for petitioners on review.

Michael D. Reynolds, Assistant Attorney General, Salem, argued the cause for respondents on review State of Oregon, Department of Parks and Recreation. With him on the response were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General. With Jack L. Landau, Deputy Attorney General, on a response were Charles S. Crookham, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for respondent on review City of Cannon Beach.

Keith A. Bartholomew, Portland, filed a brief for *amici curiae* 1000 Friends of Oregon, League of Women Voters of Oregon, and Oregon Shores Conservation Coalition.

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

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* Appeal from Clatsop County Circuit Court, Thomas E. Edison, Judge. 114 Or App 457, 835 P2d 940 (1992).

VAN HOOMISSEN, J.

Plaintiffs appeal a trial court's judgment dismissing their complaint for inverse condemnation for failure to state a claim. ORCP 21A(8). Plaintiffs own two vacant lots in the dry sand area of the City of Cannon Beach (city).[1] They applied to defendants city and Oregon Department of Parks and Recreation (department) for permits to build a seawall as part of the eventual development of the lots for motel or hotel use. City and department denied the application on a number of grounds.

Plaintiffs then brought this inverse condemnation action, alleging that defendants' denials, and the ordinances and rules on which they were based, resulted in a taking of plaintiffs' property, in violation of Article I, section 18, of the Oregon Constitution, and the Fifth Amendment of the United States Constitution. Defendants moved to dismiss plaintiffs' complaint, pursuant to ORCP 21A(8). Relying on *State ex rel Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969) (*Thornton*), the trial court allowed defendants' motions. The Court of Appeals affirmed. *Stevens v. City of Cannon Beach*, 114 Or App 457, 835 P2d 940 (1992). For the reasons that follow, we affirm the decision of the Court of Appeals.

Plaintiffs are the owners of two vacant ocean front lots in Cannon Beach, which have been improved by construction of streets and provision of utilities. Although the lots are zoned for residential or motel use, parts of them are subject to city's Active Dune and Beach Overlay zone. That zoning implements a portion of the Land Conservation and Development Commission's (LCDC) Statewide Goal 18, which limits "residential developments and commercial and industrial buildings on beaches, and on active foredunes, and other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping." Zoning Ordinance of Cannon Beach 79-4A, § 3.180. Parts of plaintiffs' lots also are within the dry sand area of the beach, as defined by

[1] For the purposes of this case, we will refer to the land below the ordinary high tide line as the "wet sand area" and the land above the ordinary high tide line but below the vegetation line as the "dry sand area." The disputed land at issue in this case is dry sand area.

the Oregon Beach Bill (Beach Bill). ORS 390.605 *et seq.*[2] Any person who wants to make an improvement on any property subject to ORS 390.640 must obtain a permit from the department. ORS 390.650.

Plaintiffs applied to city for a conditional use permit to build the seawall. City denied plaintiffs' application, in part because city found that the eventual proposed commercial use of the property conflicted with LCDC Goal 18.[3] Plaintiffs also applied to department for a permit to build the seawall within the dry sand area of the beach. ORS 390.650. That permit also was denied.[4]

[2] ORS 390.605 provides in part:

"As used in ORS 390.610 * * *:

"* * * * *

"(2) 'Ocean shore' means the land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described in ORS 390.770."

ORS 390.615 provides:

"Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law."

[3] Plaintiffs' application to city also failed to satisfy a number of criteria for a conditional use permit. City's findings of fact state: that the design of the proposed seawall was not based on findings of a geologic site investigation, as required by city's comprehensive plan; that the proposed seawall conflicted with Flood Hazard Policy 3, because the calculated 100-year velocity flood would overtop the proposed seawall by 4.9 feet, which could result in damage to structures located behind the seawall; and that plaintiffs had failed to demonstrate that other higher-priority methods of erosion control (such as maintenance or planting of vegetation) would not be effective to stabilize the shoreline and that therefore the seawall (the lowest priority stabilization method) was required.

[4] Plaintiffs' application to department also failed to satisfy a number of criteria for a permit. Department's findings of fact state: that plaintiffs had not demonstrated erosion in the area that required a new seawall; that they had not demonstrated the need for new motel units in the city; that they had failed to obtain the permit required by ORS 196.810 for fill removal; that the proposed seawall would obstruct the view; that the seawall would remove 12,500 feet of dry sand area used extensively for public recreation; that recreational access would be impaired; that the seawall would present an escape route obstacle to beach users (particularly to senior citizens and others whose mobility is impaired); that neighboring property and land in front of the seawall could be subject to accelerated erosion; and that the proposed design did not protect on-shore property from wave overtopping and the 100-year flood.

Plaintiffs then brought this inverse condemnation action against defendants, alleging that city's denial of a permit is a taking of private property for a public purpose, in violation of Article I, section 18,[5] and the Fifth Amendment (an "as applied" taking), and that city's Zoning Ordinance 79-4A, implementing LCDC Goal 18, on its face, is an unconstitutional taking of private property for a public purpose ("facial" taking).[6]

Plaintiffs further alleged that department's denial of a permit is an unconstitutional "as applied" taking of their property and that department's rules implementing LCDC Goal 18 are an unconstitutional "facial" taking. Plaintiffs also claimed that compliance with other technical requirements for the proposed seawall could not result in the award of the permits and that, therefore, they had pursued all available means of relief with defendants.

Defendants filed ORCP 21A(8) motions to dismiss against plaintiffs' complaint, arguing that plaintiffs' takings allegations failed to state ultimate facts sufficient to constitute claims. The trial court granted defendants' motions with prejudice, citing *Thornton, supra*. The court explained that defendants' denials took nothing from plaintiffs, because plaintiffs' property interests in the lots never have included development rights that could interfere with the public's use of the dry sand area.[7] Accordingly, the court entered judgment for defendants.

In the Court of Appeals, plaintiffs argued that the trial court erred in holding that *Thornton* precluded any development of the dry sand area of their property. The Court

[5] Because plaintiffs have not made a separate argument under the state constitution, we will assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution. *See Dept. of Trans. v. Lundberg*, 312 Or 568, 572, 572 n 4, 825 P2d 641 (1992) (stating principle).

[6] *See* Annot, *Supreme Court's View As To What Constitutes "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation*, 89 L Ed 2d 977 (1988).

[7] Plaintiffs then voluntarily dismissed without prejudice a final claim for *de novo* review of department's denial of the permit. ORS 390.658 provides in part:

> "Any person aggrieved by the decision of the State Parks and Recreation Department under ORS 390.650 is entitled to petition the circuit court of the county where the property is located for a judicial review, de novo as in equity, of the action or failure to act by the department."

of Appeals disagreed and affirmed, quoting *Thornton*:

> " 'The disputed area [dry sand area] is *sui generis*. While the foreshore is "owned" by the state, and the upland is "owned" by the patentee or record title holder, neither can be said to "own" the full bundle of rights normally connoted by the term "estate in fee simple." * * *
>
> " '* * * * *
>
> " 'The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.' 254 Or at 591, 599." *Stevens v. City of Cannon Beach, supra*, 114 Or App at 459-60.

The court also noted that the recent decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council*, 505 US ____, 112 S Ct 2886, 120 L Ed 2d 798 (1992) (*Lucas*) did not require a different result. *Ibid.* Accordingly, the court concluded that the trial court did not err in dismissing plaintiffs' taking claims.

On review,[8] plaintiffs argue that the Court of Appeals' decision in this case conflicts with the recent decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council, supra*. Plaintiffs further argue that, because they acquired their property before this court's 1969 decision in *Thornton*, the rule from *Thornton* may not be applied retroactively to them.[9] Finally, plaintiffs argue that the trial court and the Court of Appeals incorrectly interpreted *Thornton* as having superseded and canceled *all* development rights of private owners on the dry sand area of city, thus impliedly repealing the provisions of the Beach Bill that allow *some* development.[10] Plaintiffs do not ask this

[8] During oral argument in this court, plaintiffs asked this court to take judicial notice of three instances where, according to plaintiffs, dry sand areas within the state of Oregon have been developed. We decline to do so. Under the Oregon Evidence Code, a court may take judicial notice of an adjudicative fact if it is generally known within the jurisdiction or if it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(b). Plaintiffs' proposed facts fit neither of those categories.

[9] The date of the *Thornton* decision is not relevant. Rather, the question is when, under *Thornton's* reasoning, *the public rights came into being*. The answer is that that they came into being long before plaintiffs acquired any interests in their land.

[10] Plaintiffs make several other assignments of error, most of which are subsumed by our framing of the main issue in this case. The others do not merit discussion.

court to overrule *Thornton*, and they do not argue that any portion of the Beach Bill is unconstitutional.

Defendants respond that, because *Lucas* holds that where the state seeks to sustain regulation that deprives land of all economically beneficial use, the state may resist compensation if the "proscribed use interests" were not part of the owner's title to begin with, *Lucas, supra*, 120 L Ed 2d at 820, *Lucas* comports with *Thornton*. Defendants argue that, because under the state property law doctrine of custom, the proscribed use interests in this case were not part of plaintiffs' title, there is no taking under *Lucas*.

Defendants further respond that, if the rule from *Thornton* could not be applied where the customary use by the public interfered with any economically beneficial uses by the dry sand area owners, *Thornton* would be severely limited. *Thornton*, defendants argue, did not create a new legal principle, but merely applied an existing legal principle of easement by custom grounded in Oregon's property law. Therefore, defendants argue, application of *Thornton* in the present case is not retroactive, any more than it was in *Thornton*. *See Hay v. Bruno*, 344 F Supp 286, 289 (D Or 1972) (rejecting argument that Oregon Supreme Court's decision in *Thornton* was a sudden change in state property law that therefore effected a taking of the property at issue in *Thornton*).

Amici curiae 1000 Friends of Oregon, the League of Women Voters of Oregon, and the Oregon Shores Conservation Coalition have submitted briefs on behalf of defendants, at both trial and appellate levels in this case. They argue that *Lucas* does not apply to the present case, because the regulations in question do not prevent "all economically beneficial use" of plaintiffs' property.[11]

[11] *Amici curiae* also set forth an interesting alternative analysis of this case, arguing that the public trust doctrine may provide a common-law source of protection of Oregon's beaches for use by the public. The public trust doctrine analysis, more in line with the specially concurring opinion of Justice Denecke in *Thornton*, has been followed in several jurisdictions. *See, e.g., Matthews v. Bay Head Imp. Assn*, 95 NJ 306, 471 A2d 355, *cert den* 469 US 821 (1984) (privately owned dry sand areas come under the umbrella of the public trust); *National Audubon Soc. v. Superior Court*, 33 Cal 3d 419, 189 Cal Rptr 346, 658 P2d 709, *cert den* 464 US 977 (1983) (landowners who purchase property subject to public trust do not state takings claims); *see also* Pitts, *The Public Trust Doctrine. A Tool for Ensuring Continued*

The parties recognize, and we agree, that *Thornton* is directly on point. The issue, therefore, is the viability of *Thornton's* rule of law in the light of *Lucas*. We therefore begin with a discussion of *Thornton*.

The facts in this case and in *Thornton* are remarkably similar. In each case, the landowners wished to enclose the dry sand area of their Cannon Beach properties, thereby excluding the public from that portion of the ocean shore. In *Thornton*, this court held that the state could prevent such enclosures because, throughout Oregon's history, the dry sand area customarily had been used by the public:

> "The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. In the Cannon Beach vicinity, state and local officers have policed the dry sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.
>
> "Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures." *Thornton, supra*, 254 Or at 588-89.

In *Thornton*, while noting that the common law of prescriptive easements also could apply, *id.* at 593-95, this court relied instead on the common law doctrine of custom to support its holding that the landowners could be prevented from excluding the public from the dry sand areas of the

Public Use of Oregon Beaches, 22 Envt'l L 731 (1992). Because of our disposition of this case on other grounds, we do not reach this argument.

ocean shore:

> "The most cogent basis for the decision in this case is the English doctrine of custom. * * * An established custom * * * can be proven with reference to a larger region [than could a prescriptive easement]. * * *
>
> "The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.
>
> "* * * * *
>
> "Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 595, 598.

See also McDonald v. Halvorson, 308 Or 340, 780 P2d 714 (1989) (because no factual predicate shown for application of doctrine of custom, general public had no right to access or to use private inland dry sand area); *State Highway v. Fultz*, 261 Or 289, 491 P2d 1171 (1971) (public has used dry sand area between ordinary high tide and vegetation line for recreational purposes since 1889).

As defined in *Thornton*, the common-law doctrine of custom may be paraphrased as follows:

> (1) The land has been used in this manner so long "that the memory of man runneth not to the contrary";
>
> (2) without interruption;
>
> (3) peaceably;
>
> (4) the public use has been appropriate to the land and the usages of the community;
>
> (5) the boundary is certain;

> (6) the custom is obligatory, *i.e.*, it is not left up to individual landowners as to whether they will recognize the public's right to access; and
>
> (7) the custom is not repugnant or inconsistent with other customs or laws. *Thornton, supra*, 254 Or at 595-97, (citing Blackstone's Commentaries).

In *Thornton*, this court determined that the historic public use of the dry sand area of Cannon Beach met those requirements.[12] *Thornton, supra*, 254 Or at 596-97; 1 William Blackstone Commentaries 76-78 (1778). *See also McDonald v. Halvorsen, supra*, 308 Or at 359-60 (Oregon common-law doctrine of custom as stated in *Thornton* applies to classic dry

[12] There is no evidence that the native peoples recognized private ownership of the beach area at the time Europeans first appeared on the scene. Indeed, there was no sovereign who could have granted, enforced, or confirmed any private property rights in the beach areas for many years after the first Europeans arrived. The law of a common area, accessible and usable by all, called "custom," was itself a common part of the legal system accompanying European settlers into the Pacific Northwest. About 1819, the United States and Great Britain agreed to postpone for 20 years settlement of the question of which was sovereign in the Pacific Northwest. Settlement was made by treaty in 1846. *See* Merk, The Oregon Question (1967); Gallatin, The Oregon Question (1846); Twiss, The Oregon Question Examined (1846); Falconer, The Oregon Question (1845); Sturgis, The Oregon Question (1845). In the interim, various franchised private companies of Great Britain may have maintained order of sorts, but themselves provided no source of law. For a brief period, settlers in the Willamette Valley formed an independent government. The Oregon Territory was organized in 1848, and Oregon became a state in 1859.

The early Oregon cases relating to this subject indicate that "the tide lands lying between high- and low-water mark belong to the state." *Bowlby v. Shively*, 22 Or 410, 419, 30 P 154 (1892), *aff'd* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894), (citing *Parker v. Taylor*, 7 Or 446 (1879)). The Supreme Court's affirmance in that case stated:

> "By the common law, both the title and the dominion of the sea * * * where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature * * *." *Shively v. Bowlby, supra*, 152 US at 11.

Although the early cases did not distinguish between dry sand and wet sand areas, this court has noted that the distinguishing line was considered to be "the 'high-water' line, a line that was then assumed to be the vegetation line." *Thornton, supra*, 254 Or at 589. It was not until 1935 that the United States Supreme Court redefined this boundary as extending to the mean high-tide line. *Borax Ltd. v. Los Angeles*, 296 US 10, 22-27, 56 S Ct 23, 80 L Ed 9 (1935). This court has noted that, although *Borax* "may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians * * * [and] had no discernible effect on the actual practices of Oregon beachgoers and upland property owners." *Thornton, supra*, 254 Or at 590.

sand areas abutting the ocean, such as Cannon Beach, but not to inland, freshwater cove with no history of customary use by public); Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 Envt'l L 731, 737 n 40 (1992) (noting other jurisdictions that have adopted the common-law doctrine of custom). We now turn to the determination of what effect the Supreme Court's opinion in *Lucas* has on Oregon's well-established policy of public access to and protection of its ocean shores, as articulated in *Thornton* and the cases following it.

In *Lucas*, the plaintiff purchased two beachfront lots in 1986, for about $1 million, intending to build single-family homes, for which the land was zoned at that time. In 1988, South Carolina passed a Beachfront Management Act, which, in effect, barred Lucas from constructing any habitable structures on the land. The state trial court found that the parcels therefore were rendered valueless by the Act. In *Lucas*, the Supreme Court recounted its regulatory takings jurisprudence, stating again that this area of the law defies clear and objective formulae for decision-making, except in cases of direct physical takings or non-physical takings that clearly deprive the owner of all economic use of the land. *Id.* 120 L Ed 2d at 812-15. The Court stated:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; 'as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.' " *Id.* (footnote omitted) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 US [393,] 413, 43 S Ct 158, 67 L Ed 322 (1922) (new statute that destroyed previously existing property rights was invalid as taking without compensation)).

The *Lucas* Court addressed a state's sudden elimination of all economically valuable use of land without compensation, holding that:

> "Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles *of the State's law of property* and nuisance already place upon land ownership." *Id.*, 120 L Ed 2d at 821 (emphasis added).

As an example, the Court explained that the owner of a lake bed would not be entitled to compensation if denied a permit to engage in landfilling if such an activity would have the effect of flooding another's land, even if the effect of the denial was to eliminate the only economically viable use of the land, because it would not have been "previously permissible under relevant property and nuisance principles." *Id.* at 821. Only when a regulation goes beyond what the relevant background principles of state law would dictate must compensation be paid. *Id.* at 822.

The *Lucas* Court then listed other factors to be considered in determining whether a taking has occurred, including: the degree of harm to public lands and resources posed by the owner's proposed activities; the degree of harm to adjacent private property; the social value and suitability of the owner's proposed activity; the ease with which the harm could be avoided; and the uses engaged in by similarly situated owners. *Ibid.* Having described this analysis, the majority remanded the case to the South Carolina courts for a determination under state law as to whether the ills sought to be avoided by the Beachfront Management Act would have been illegal under the common law of private or public nuisance, recognizing that it was unlikely that this would be the case. *Id.* at 822.

Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 821. As noted in *Hay v. Bruno, supra*, 344 F Supp at 289, "there was no

sudden change in either the law or the policy of the State of Oregon. For at least 80 years, the State as a matter of right claimed an interest in the disputed land." Plaintiffs' argument that a "retroactive" application of the *Thornton* rule to their property is unconstitutional, is not persuasive. *Thornton* did not create a new rule of law and apply it retroactively to the land at issue in that case, *Hay v. Bruno, supra*; nor did *Thornton* create a new rule of law as applied to plaintiffs' land here. *Thornton* merely enunciated one of Oregon's "background principles of * * * the law of property." *Lucas, supra*, 120 L Ed 2d at 821. We therefore agree with the Court of Appeals, which concluded that the trial court's reading and application of *Thornton* were correct. 114 Or App at 459.

When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 598. *See also State Highway v. Fultz, supra*, 261 Or at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of "the restrictions that background principles of the State's law of property * * * already place upon land ownership." *Lucas, supra*, 120 L Ed 2d at 821. We hold that plaintiffs have never had the property interests that they claim were taken by defendants' decision and regulations.

Plaintiffs, however, do not simply claim that the doctrine of custom is no longer viable after *Lucas*. They also claim that the various statutory schemes that serve to implement that doctrine are unconstitutional. We proceed to examine that claim.

In the years following the *Thornton* case, the Oregon Beach Bill was revised, and the comprehensive land use laws leading to the eventual implementation of LCDC Goal 18 at state and local levels were enacted. Those laws recognized and accommodated the common doctrine of customary use of Oregon's beaches. The Oregon Beach Bill provides in part:

> "(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use

> has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.
>
> "(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.
>
> "(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." ORS 390.610.

In order to implement that policy, the Beach Bill provides that a permit must be obtained for improvements to the ocean shore below the vegetation line (*i.e.*, within the dry sand area of the beach). ORS 390.640(1). An application for such a permit is made to department. After notice and a hearing, and after considering a number of factors, department may approve or deny the permit. ORS 390.650; ORS 390.655. Those factors include:

> "(1) The public need for healthful, safe, esthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.
>
> "(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.
>
> "(3) The land uses, including public recreational use if any, and the improvements in the area, the trends in land uses and improvements, the density of development and the property values in the area.
>
> "(4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area." ORS 390.655.

The standards used by department in issuing a permit are further defined in OAR 736-20-005 to OAR 736-20-030, and include:

"In accordance with the Statewide Land Conservation and Development Commission Goal #18 for Beaches and Dunes, permit applications for beachfront protective structures seaward of the beach zone line will be considered only where development existed on January 1, 1977. The proposed project will be evaluated against the applicable criteria included within Goal #18 and other appropriate statewide planning goals." OAR 736-20-010(6).[13]

LCDC Statewide Planning Goal 18 Implementation Requirements, relating to beaches and dunes, include the following:

"(2) Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping * * *. Other development in these areas shall be permitted only if the findings required in (1) above[14] are presented and it is demonstrated that the proposed development:

"a. Is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and

"b. Is designed to minimize adverse environmental effects.

"* * * * *

[13] Other considerations specified in OAR 736-20-005 to OAR 736-20-030 include project need, protection of public rights, compliance with other laws, project modification and other costs, scenic, recreational, and safety concerns, and concerns for other resources such as wildlife. Department made detailed findings regarding all of those considerations, all of which, except concerns for other resources such as wildlife, served as bases for denial of the permit. *See* note 4, *supra*.

[14] Those findings must include:

"a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;

"b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;

"c. Methods for protecting the surrounding area from any adverse effects of the development; and

"d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use." LCDC Statewide Planning Goal 18, Implementation Requirements.

The findings accompanying department's denials of plaintiffs' permits satisfy those criteria.

"(5) Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For purposes of this requirement * * *, 'development' means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.

"The criteria for review of all shore and beachfront protective structures shall provide that:

"a. visual impacts are minimized;

"b. necessary access to the beach is maintained;

"c. negative impacts on adjacent property are minimized; and

"d. long-term or recurring costs to the public are avoided."

Plaintiffs argue that LCDC Goal 18 itself, as implemented by city ordinance, and as relied on by department as one of the criteria that it used in considering whether a permit should be allowed, is unconstitutional, both facially and as applied to their land.

We first address whether the regulations at issue here constitute a facial taking of plaintiffs' land. Plaintiffs argue that, because it prohibits residential developments and commercial and industrial buildings on beaches, LCDC Goal 18 (as codified in both city's ordinance and department's regulations) constitutes a facial taking of their land. In *Dolan v. City of Tigard*, 317 Or 110, 118, ___ P2d ___ (1993), this court stated:

"A land-use regulation does not effect a 'taking' of property, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. *Nollan v. California Coastal Comm'n*, 483 US 825, 835-36, 107 S Ct 3141, 97 L Ed 2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedicitis*, 480 US 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987); *Agins v. City of Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980)."

Plaintiffs here do not argue that defendants' denials and the authority on which they rely do not substantially advance a legitimate state interest.

The Supreme Court has stated that plaintiffs "face an uphill battle in making a facial attack on [a statute or regulation] as a taking." *Keystone Bituminous Coal Assn. v. DeBenedictis, supra*, 480 US at 495. In general, "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 294, 101 S Ct 2352, 69 L Ed 2d 1 (1981) (citations omitted).

> "The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land * * *' " *Id.* (quoting *Agins v. Tiburon*, 447 US 255, 295-96, 100 S Ct 2138, 65 L Ed 2d 106 (1980)).[15]

Plaintiffs argue that the regulation and ordinance deprive them of all economically viable use of their property. It is clear from LCDC Goal 18, however, as well as from the regulations and ordinances at issue here, that what is prohibited is "residential developments and commercial and industrial buildings." Not all economically viable uses of plaintiffs' property falls within that prohibition. Notably, in some circumstances, LCDC Goal 18's implementation requirements appear to allow for single-family dwellings. *See, e.g.*, LCDC Goal 18, Implementation Requirement 4. Moreover, LCDC Goal 18, as well as the rules and ordinances, provides for development of beach front protective structures. Although Implementation Requirement 2, cited by plaintiffs, does prohibit residential developments and commercial and industrial buildings on beaches, Implementation Requirement 5 specifically *allows* beach front protective structures such as seawalls in some circumstances. The provisions of city's Comprehensive Plan and Zoning Ordinance 79-4A, as well as

[15] *See Agins v. Tiburon*, 447 US 255, 260-61, 100 S Ct 2138, 65 L Ed 2d 106 (1980) ("Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests").

department's administrative rules (OAR 736-20-005 to 736-20-020) comport with those implementation requirements. *See* notes 3, 4, *supra*. Because LCDC Goal 18 makes provisions for certain economically viable uses of private beaches and dunes, we conclude that city's ordinances and department's administrative rules implementing that goal do not constitute a facial taking of private property.

Turning to plaintiffs' "as applied" challenges, we note that plaintiffs' focus in this case has been their inability to construct a *motel or hotel* on their lots. Implicit in their arguments is the assumption that that is the "economic use" that they have been denied. That assumption, however, is mistaken. Plaintiffs were not denied permits to construct a *motel or hotel* on their lots; rather, they were denied permits to construct a *seawall*. Plaintiffs do not contend that the seawall itself is a residential development or a commercial or industrial building prohibited by the ordinances and rules at issue here. We decline, therefore, to analyze plaintiffs' "as applied" taking claim *as if* a permit to build a motel or hotel had been denied under the LCDC Goal 18 criteria. That simply is not the case.

City's findings of fact state that "the area of the proposed seawall was 'developed' in January 1977. Therefore, beachfront protective structures, such as a seawall, may be permitted." Complaint, Exhibit 1, at 13; *see* LCDC Goal 18 Implementation Requirement 5, quoted *supra*. Thus, plaintiffs' attack on city's ordinances, at best, is indirect, because it is clear that in some circumstances seawalls may be permitted. Plaintiffs rely on city's findings of fact that the purpose of the proposed seawall is "to stabilize and protect private property and that after the construction of the seawall the property *may* be used for commercial purposes." Complaint, Exhibit 1, at 4 (emphasis added).

Only one of city's 14 findings of fact relates to the possible commercial use of the lots; it indicates that the purpose of the proposed seawall was not to minimize an erosion hazard but, rather, to facilitate commercial development in a manner inconsistent with the general prohibition on residential developments and commercial and industrial buildings on beaches. Neither city's findings nor its ordinances suggest that exceptions consistent with the provisions

of LCDC Goal 18 never would be allowed. City's findings show that plaintiffs failed to comply with *10* of city's 14 standards. Nine of those failures to comply were not directly concerned with the possible commercial use of the property. Thus, it is far from clear that meeting the "other technical objections" (as plaintiffs describe those numerous other criteria that their permit applications failed to meet) would not have resulted in city's approval of plaintiffs' conditional use permit to build a seawall.

Department's denial of the permit was based on numerous other criteria as well.[16] See note 4, *supra*. Plaintiffs do not argue that those criteria are unconstitutional. We conclude, therefore, that department's findings regarding the LCDC Goal 18 criteria, flawed though they were, did not necessarily cause the denial of the permit to build a seawall.

The purpose of LCDC Goal 18 is

> "To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and
>
> "To reduce the hazard to human life and property from natural or man-induced actions associated with these areas."

Department's administrative rules and city's ordinances at issue in this case serve to mesh the purposes of the common law of custom, the Beach Bill, and LCDC Goal 18.

---

[16] The state's denial of the permits to build the seawall was premised on its findings that plaintiffs failed to meet the criteria set forth in OAR 736-20-005 through OAR 736-20-025. Only OAR 736-20-010(6) pertains to the requirements of LCDC Goal 18. In its finding pertaining to this subsection, however, the state erroneously found that no development existed on these lots before January 1, 1977. Complaint, Exhibit 2, at 9. This finding conflicts with city's finding in this regard, as well as the facts as stated in plaintiffs' complaint, which we take as true for purposes of this review. The lots in question were "developed" under the definition provided in LCDC Goal 18 Implementation Requirement 5, because they were "vacant subdivision lots which are physically improved through construction of streets and provision of utilities[.]" We conclude that the state's finding was erroneous, but we are unable to conclude that the error was the reason for denial of the permit in the present case or that compliance with "technical objections" would have been futile.

Had plaintiffs pursued the remedy available for review of department's decision, that error could have been addressed. ORS 390.658. Plaintiffs, however, chose to dismiss their claim under that statute. The fact that review of this issue would have been available under ORS 390.658 certainly undermines plaintiffs' claim that pursuit of other remedies would have been futile.

Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because "the proscribed use interests" asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment. *Lucas, supra*, 120 L Ed 2d at 820. Moreover, because it is clear that, under the challenged ordinances and regulations, a seawall could be built on plaintiffs' land if the other criteria, not challenged in this case, were met, those sources of law withstand an "as applied" challenge in the present case. We hold that there was no taking of plaintiffs' property within the meaning of the Fifth Amendment. *Lucas, supra*.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Argued and submitted June 24, affirmed August 5, reconsideration denied September 23, petition for review allowed December 22, 1992 (315 Or 271)
See later issue Oregon Reports

Irving C. STEVENS
and Jeanette Stevens,
Appellants,

v.

CITY OF CANNON BEACH
and State of Oregon,
Department of Parks & Recreation,
Respondents.

(90-2061; CA A68916)

835 P2d 940

Owners of vacant lots in dry sand area of city brought inverse condemnation action alleging that denial of application for permits to build sea wall constituted uncompensated taking. The Circuit Court, Thomas E. Edison, J., dismissed claims, and owners appealed. The Court of Appeals, Buttler, P. J., held that denial of applications took nothing from owners because their property interests never included development rights that could interfere with public's use of dry sand area.

Affirmed.

Eminent Domain – Nature, extent, and delegation of power – What constitutes a taking; police and other powers distinguished – Relating to waters or water courses

Denial of landowners' application for permits to build sea wall as part of eventual development of vacant lots in dry sand area of city for motel or hotel use was not uncompensated taking within meaning of Oregon or United States Constitutions; owners' property interests never included development rights that could interfere with public's use of dry sand area. Or Const, Art I, § 18; US Const, Amend V.

CJS, Eminent Domain § 13.

Appeal from Circuit Court, Clatsop County.

Thomas E. Edison, Judge.

Garry P. McMurry, Portland, argued the cause for appellants. With him on the briefs was Garry P. McMurry & Assoc., Portland.

Jack L. Landau, Deputy Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

William R. Canessa and Campbell, Moberg & Canessa, P.C., Seaside, filed the brief for respondent City of Cannon Beach.

Keith A. Bartholomew, and Interns, Michael Clinton and Carrie Stilwell, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon, League of Women Voters of Oregon and Oregon Shores Conservation Coalition.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

BUTTLER, P. J.

Affirmed.

"* * * * *

> "The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his." 254 Or at 591, 599.

See also McDonald v. Halvorson, 308 Or 340, 780 P2d 714 (1989).

In short, under the Supreme Court's decision in *Hay*, plaintiffs have never had the property interests that they claim were taken by defendants' decisions and regulations. The question before *this* court, therefore, is necessarily very narrow. We must follow the Supreme Court's decision unless, as plaintiffs argue, that decision constitutes a taking in itself and is contrary to United States Supreme Court decisions applying the Takings Clause of the Fifth Amendment.

After oral arguments in this case, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council*, 505 US ___, 112 S Ct 2886, 120 L Ed 2d 798 (1992). The Court said:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[3] 505 US at ___, 120 L Ed 2d at 820. (Footnote omitted.)

The opinion makes it clear that that issue is to be decided under the "State's law of property and nuisance." ___ US at ___, 120 L Ed 2d at 821.

State ex rel Thornton v. Hay, supra, is an expression of state law that the purportedly taken property interest was not part of plaintiffs' estate to begin with. Accordingly, there was no taking within the meaning of the Oregon or United States Constitutions. The trial court did not err by dismissing the taking claims.

Given the basis for our holding, we do not reach the parties' other arguments.

Affirmed.

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[3] We assume for purposes of discussion, but do not decide, that defendants' actions would deprive plaintiffs of all economically beneficial use of the lots.

THOMAS E. EDISON
CIRCUIT JUDGE

P.O. Box 835
TEL. (503) 325-8555
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Circuit Court of Oregon
CLATSOP COUNTY COURTHOUSE
ASTORIA, OREGON 97103

January 8, 1991

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RE: Stevens v. Cannon Beach, et al
Clatsop County No. 90-2061

Gentlemen:

On October 31, 1990 this Court heard oral argument on defendant City of Cannon Beach's motions to dismiss plaintiff's first and second claims of the amended complaint herein and defendant State of

Oregon's motions to dismiss plaintiff's third and fourth claims and to strike certain matters from the prayer of the amended complaint pertaining to plaintiff's fifth claim.

At the time of the said oral argument I knew that I would be engaged during the entire month of November 1990, in holding court in other counties because of an aggravated murder case being prosecuted in this court and so would not be able to deal with this case until later. I therefore asked the court reporter to transcribe the oral arguments for my future reference in writing this opinion. Unfortunately, the court reporter met with severe health problems which have to date prevented her from transcribing that argument for such use. It is also apparent that we now must consider the provisions of UTCR 2.030 (1) which require trial courts to decide matters taken under advisement within sixty days. Therefore, this is not the opinion letter that I desired to write but the time limitations require an immediate ruling.

This is a suit brought on the theory of inverse condemnation wherein the plaintiffs contend that the local and state government defendants have taken their property rights without paying just compensation. The plaintiffs are owners of ocean front property in the City of Cannon Beach who desire to construct a seawall on the dry sand portion of the beach, and after backfilling, to construct a motel thereon. They made application for such construction both to the defendant City and to the Parks and Recreation Department of the defendant State. The applications

were denied. It is this denial which prevents them from developing their property that plaintiffs contend constitutes the wrongful taking of their property rights.

In deciding whether plaintiffs can proceed on this theory we must look for guidance, if available, in the decisions of our own appellate courts. It appears that the Oregon Supreme Court has settled this matter by its decision in State ex rel Thornton v. Hay, 254 Or 584 (1969). This case teaches us that ocean front owners cannot enclose or develop the dry sand beach area so as to exclude the public therefrom. The Court based this restriction on the common law doctrine of custom, that is, because of the public's ancient and continued use of the dry sand area on the Oregon coast that its future use thereof cannot be curtailed or limited. This means that land owners cannot build on the beach because to do so would deny the public's rights to access. Therefore, the defendant's denial of the applications for development took nothing from the plaintiffs since they never had such a right. The motions against the first four claims of the plaintiffs are therefore allowed and they are dismissed.

Concerning the motion to strike certain portions of the prayer of the complaint pertaining to plaintiffs fifth claim, I likewise agree with the contentions of the defendant State of Oregon and will allow that motion. ORS 390.658 cannot support a claim for an award of damages for inverse condemnation and an award of attorneys fees.

I recognize that the defendants have also raised contentions that the amended complaint does not adequately plead the elements of a takings claim and that such takings claims are not ripe for determination. In view of my decision that there was no taking as aforesaid, these issues are moot and no determination by this Court is necessary.

I will ask Mr. Landau and Mr. Canessa to draw and submit appropriate orders accordingly.

Very truly yours,

/s/ Thomas E. Edison

THOMAS E. EDISON
Circuit Judge

TEE:st

Oregon Admission Acts

(1991 EDITION)

ACT OF CONGRESS ADMITTING OREGON INTO UNION

[Approved February 14, 1859]

Preamble. Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States; Therefore —

Section 1. Announcement of admission; boundaries of state; jurisdiction of river cases. That Oregon be, and she is hereby, received into the Union on an equal footing with the other States in all respects whatever, with the following boundaries: In order that the boundaries of the State may be known and established, it is hereby ordained and declared that the State of Oregon shall be bounded as follows, to wit: Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the

State, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla-Walla, where the forty-sixth parallel of north latitude crosses said river; thence east, on said parallel, to the middle of the main channel of the Shoshones or Snake River; thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south, to the parallel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State. [11 Stat. 383 (1859)]

Section 2. Jurisdiction over waters forming boundary of state; use of navigable waters as free highways. That the said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well as to the inhabitants of said State as to all other citizens

of the United States, without any tax, duty, impost, or toll therefor. [11 Stat. 383 (1859)]

Section 3. Representation in Congress. That until the next census and apportionment of representatives, the State of Oregon shall be entitled to one representative in the Congress of the United States. [11 Stat. 383 (1859)]

Section 4. Certain propositions offered to people of Oregon for acceptance or rejection. That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of

the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State, for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided,

however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act. [11 Stat. 383 (1859)]

Note. By section 20 of the Act of August 14, 1848, establishing a territorial government for Oregon, the sixteenth and thirty-sixth sections were reserved for school purposes.

Section 5. Residue of Oregon Territory incorporated into Washington Territory. That until Congress shall otherwise direct, the residue of the Territory of Oregon shall be, and is hereby, incorporated into, and made a part of the Territory of Washington. [11 Stat. 383 (1859)]

ACCEPTANCE BY OREGON OF PROPOSITIONS OFFERED BY CONGRESS IN ADMISSION ACT

[Approved June 3, 1859]

Whereas, the Congress of the United States did pass an act, entitled "An Act for the admission of Oregon into the Union," approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the State of Oregon, in the words following: "§4. The following propositions be, and the same are hereby, offered to the said people of Oregon, for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State

tor the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is vested in an individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State, which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than

residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided, however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act," Therefore,

Section 1. Be it enacted by the Legislative Assembly of the State of Oregon, That the six propositions offered to the people of Oregon in the above-recited portion of the act of Congress aforesaid, be, and each and all of them are hereby accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

Be it ordained by the Legislative Assembly of the State of Oregon, That the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. And that the said State shall never tax the lands or property of the United States within said State. [1859 (First extra session) p. 29]

OCEAN SHORES; STATE RECREATION AREAS

(General Provisions)

390.605 "Improvement," "ocean shore," and "state recreation area" defined. As used in ORS 390.610, 390.620 to 390.660, 390.690, and 390.705 to 390.770, unless the context requires otherwise:

(1) An "improvement" includes a structure, appurtenance or other addition, modification or alteration constructed, placed or made on or to the land.

(2) "Ocean shore" means the land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described by ORS 390.770.

(3) "State recreation area" means a land or water area, or combination thereof, under the jurisdiction of the State Parks and Recreation Department used by the public for recreational purposes. [Formerly 274.065 and then 390.710; 1989 c.904 §23]

390.610 Policy. (1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore legally existing over the ocean shore of the state from the Columbia River on the north to the Oregon-California line on the south so that the public may have the free and uninterrupted use thereof.

(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally sufficient to create rights or easements in the public through

dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.

(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore. [1967 c.601 §§1, 2(1), (2), (3); 1969 c.601 §4]

390.615 Ownership of Pacific shore; declaration as state recreation area. Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law. [Formerly 274.070 and then 390.720]

390.620 Pacific shore not to be alienated; judicial confirmation. (1) No portion of the lands described by ORS 390.610 or any interest either therein now or hereafter acquired by the State of Oregon or any political subdivision thereof shall be alienated

except as expressly provided by state law. The State Parks and Recreation Department and the State Land Board shall have concurrent jurisdiction to undertake appropriate court proceedings, when necessary, to protect, settle and confirm all such public rights and easements in the State of Oregon.

(2) No portion of the ocean shore declared a state recreation area by ORS 390.610 shall be alienated by any of the agencies of the state except as provided by law.

(3) In carrying out its duties under subsection (1) of this section with respect to lands and interests in land within the ocean shore, the State Land Board shall act with respect to the portion of the tidal submerged lands, as defined in ORS 274.705 (7), and the submersible lands, as defined in ORS 274.005 (8), that are situated within the ocean shore as it does with respect to other state-owned submerged and submersible lands within navigable waters of this state.

(4) In carrying out its duties under subsection (1) of this section with respect to lands and interests in land within the ocean shore, the State Parks and Recreation Department shall act with respect to such lands and interests as it does with respect to other lands and interests within state recreation areas. [1967 c.601 §§2(4), 3; 1969 c.601 §5; 1973 c.364 §1]

390.630 Acquisition along ocean shore for state recreation areas or access. The State Parks and Recreation Department, in accordance with ORS 390.121, may acquire ownership of or interests in the ocean shore or lands abutting, adjacent or contiguous to the ocean shore as may be appropriate for

state recreation areas or access to such areas where such lands are held in private ownership. However, when acquiring ownership of or interests in lands abutting, adjacent or contiguous to the ocean shore for such recreation areas or access where such lands are held in private ownership, the department shall consider the following:

(1) The availability of other public lands in the vicinity for such recreational use or access.

(2) The land uses, improvements, and density of development in the vicinity.

(3) Existing public recreation areas and accesses in the vicinity.

(4) Any local zoning or use restrictions affecting the area in question. [1967 c.601 §4; 1969 c.601 §6; 1989 c.904 §24]

(Regulating Use of Ocean Shore)

390.635 Jurisdiction of department over recreation areas. Except as provided by ORS 273.551, 274.710 and 390.620, the State Parks and Recreation Department has jurisdiction over the land and interests in land acquired under ORS 390.610, 390.615, 390.620 or 390.630 in order to carry out the purposes of ORS 390.610, 390.620 to 390.660, 390.690 and 390.705 to 390.770. [1969 c.601 §21; 1973 c.364 §2]

390.640 Permit required for improvements on ocean shore; exceptions. (1) In order to promote the public health, safety and welfare, to protect the state recreation areas recognized and declared by ORS 390.610 and 390.615, to protect the safety of

the public using such areas, and to preserve values adjacent to and adjoining such areas, the natural beauty of the ocean shore and the public recreational benefit derived therefrom, it is necessary to control and regulate improvements on the ocean shore. Unless a permit therefor is granted as provided by ORS 390.650, no person shall make an improvement on any property that is within the area described by ORS 390.770.

(2) This section does not apply to permits granted pursuant to ORS 390.715, or to rules promulgated or permits granted under ORS 390.725.

(3) This section does not apply to continuous extensions of densely vegetated land areas which are above the 16 foot contour and lying seaward of the line established by ORS 390.770 as of August 22, 1969. The elevation mentioned in this subsection refers to the United States Coast and Geodetic Survey Sea-Level Datum of 1929 through the Pacific Northwest Supplementary Adjustment of 1947. [1967 c.601 §5; 1969 c.601 §7; 1973 c.642 §14]

390.650 Improvement permit procedure. (1) Any person who desires a permit to make an improvement on any property subject to ORS 390.640 shall apply in writing to the State Parks and Recreation Department on a form and in a manner prescribed by the department, stating the kind of and reason for the improvement.

(2) Upon receipt of a properly completed application, the State Parks and Recreation Department shall cause notice of the application to be posted at or near the location of the proposed improvement. The notice shall include the name of the applicant, a

description of the proposed improvement and its location and a statement of the time within which interested persons may file a request with the department for a hearing on the application. The department shall give notice of any application, hearing or decision to any person who files a written request with the department for such notice.

(3) Within 30 days after the date of posting the notice required in subsection (2) of this section, the applicant or 10 or more other interested persons may file a written request with the State Parks and Recreation Department for a hearing on the application. If such a request is filed, the department shall set a time for a hearing to be held by the department. The department shall cause notice of the hearing to be posted in the manner provided in subsection (2) of this section. The notice shall include the time and place of the hearing. After the hearing on an application or, if a hearing is not requested, after the time for requesting a hearing has expired, the department shall grant the permit if approval would not be adverse to the public interest. ORS 183.310 to 183.550 does not apply to a hearing or decision under this section.

(4) In acting on an application, the State Parks and Recreation Department shall take into consideration the matters described by ORS 390.655. The department shall act on an application within 60 days after the date of receipt or, if a hearing is held, within 45 days after the date of the hearing.

(a) If the permit is denied upon the grounds that the same would be adverse to the public interest the department shall

make written findings setting forth the specific reasons for the denial.

(b) A copy of the written findings shall be furnished to the applicant within 30 days following denial of the application as provided in this subsection.

(5) Subsections (2) and (3) of this section do not apply to an application for a permit for the repair, replacement or restoration, in the same location, of an authorized improvement or improvement existing on or before May 1, 1967, if the repair, replacement or restoration is commenced within three years after the damage to or destruction of the improvement being repaired, replaced or restored occurs.

(6) The State Parks and Recreation Department may, upon application therefor, either written or oral, grant an emergency permit for a new improvement, dike, revetment, or for the repair, replacement or restoration of an existing, or authorized improvement where property or property boundaries are in imminent peril of being destroyed or damaged by action of the Pacific Ocean or the waters of any bay or river of this state. Said permit may be granted by the department without regard to the provisions of subsections (1), (2), (3), (4) and (5) of this section. Any emergency permit granted hereunder shall be reduced to writing by the department within 10 days after granting the same with a copy thereof furnished to the applicant. [1967 c.601 §6; 1969 c.601 §10; 1979 c.186 §21]

390.655 Standards for improvement permits. The State Parks and Recreation Department shall consider applications and issue permits under ORS 390.650 in accor-

dance with standards designed to promote the public health, safety and welfare and carry out the policy of ORS 390.610, 390.620 to 390.660, 390.690, and 390.705 to 390.770. The standards shall be based on the following considerations, among others:

(1) The public need for healthful, safe, esthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.

(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.

(3) The land uses, including public recreational use if any, and the improvements in the area, the trends in land uses and improvements, the density of development and the property values in the area.

(4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area. [1969 c.601 §11; 1979 c.186 §22]

390.658 Judicial review of department action on improvement permit application. Any person aggrieved by the decision of the State Parks and Recreation Department under ORS 390.650 is entitled to petition the circuit court of the county where the property is located for a judicial review, de novo as in equity, of the action or failure to act by the department. A petition filed under this section shall be filed within 60 days after the entry of the findings provided

for in ORS 390.650 (4) or after the expiration of the period prescribed for action, by the department under ORS 390.650. [1969 c.601 §12; 1979 c.186 §23]

390.660 Regulation of use of lands adjoining ocean shores. The State Parks and Recreation Department is hereby directed to protect, to maintain and to promulgate rules governing use of the public of property that is subject to ORS 390.640, property subject to public rights or easements declared by ORS 390.610 and property abutting, adjacent or contiguous to those lands described by ORS 390.615 that is available for public use, whether such public right or easement to use is obtained by dedication, prescription, grant, state-ownership, permission of a private owner or otherwise. [1967 c.601 §7; 1969 c.601 §16]

390.665 [Formerly 274.100 and then 390.740; repealed by 1971 c.743 §432]

390.668 Motor vehicles and aircraft use regulated in certain zones; zone markers; proceedings to establish zones. (1) The State Parks and Recreation Department may establish zones on the ocean shore where travel by motor vehicles or landing of any aircraft except for an emergency shall be restricted or prohibited. After the establishment of a zone and the erection of signs or markers thereon, no such use shall be made of such areas except in conformity with the rules of the department.

(2) Proceedings to establish a zone:

(a) May be initiated by the department on its own motion; or

(b) Shall be initiated upon the request of 20 or more landowners or residents or upon request of the governing body of a county or city contiguous to the proposed zone.

(3) A zone shall not be established unless the department first holds a public hearing in the vicinity of the proposed zone. The department shall cause notice of the hearing to be given by publication, not less than seven days prior to the hearing, by at least one insertion in a newspaper of general circulation in the vicinity of the zone.

(4) Before establishing a zone, the department shall seek the approval of the local government whose lands are adjacent or contiguous to the proposed zone. [Formerly 274.090 and then 390.730]

390.670 [1967 c.601 §8; 1969 c.601 §13; repealed by 1971 c.780 §7]

390.680 [1967 c.601 §9; 1969 c.601 §17; repealed by 1973 c.732 §5]

390.685 Effect of ORS 390.605, 390.615, 390.668 and 390.685. Nothing in ORS 390.605, 390.615, 390.668 and 390.685 is intended to repeal ORS 836.510 to 836.525. [Formerly 274.110 and then 390.750]

390.690 Title and rights of state unimpaired. Nothing in ORS 390.610, 390.620 to 390.660, 390.690 and 390.705 to 390.770 shall be construed to relinquish, impair or limit the sovereign title or rights of the State of Oregon in the shores of the Pacific Ocean as the same may exist before or after July 6, 1967. [1967 c.601 §10]

(Special Permits)

390.705 Prohibition against placing certain conduits across recreation area and against removal of natural products. No person shall:

(1) Place any pipeline, cable line or other conduit across and under the state recreation areas described by ORS 390.635 or the submerged lands adjacent to the ocean shore, except as provided by ORS 390.715.

(2) Remove any natural product from the ocean shore, other than fish or wildlife, agates or souvenirs, except as provided by ORS 390.725. [1969 c.601 §20]

390.710 [Formerly 274.065; 1969 c.601 §2; renumbered 390.605]

390.715 Permits for pipe, cable or conduit across ocean shore and submerged lands. (1) The State Parks and Recreation Department may issue permits under ORS 390.650 to 390.658 for pipelines, cable lines and other conduits across and under the ocean shore and the submerged lands adjacent to the ocean shore, upon payment of just compensation by the permittee. Such permit is not a sale or lease of tide and overflow lands within the scope of ORS 274.040.

(2) Whenever the issuance of a permit under subsection (1) hereof will affect lands owned privately, the State Parks and Recreation Department shall withhold the issuance of such permit until such time as the permittee shall have obtained an easement, license or other written authorization from the private owner, which easement, license or other written authority must meet the

approval of the State Parks and Recreation Department, except as to the compensation to be paid to the private owner.

(3) All permits issued under this section are subject to conditions that will assure safety of the public and the preservation of economic, scenic and recreational values and to rules promulgated by state agencies having jurisdiction over the activities of the grantee or permittee. [1969 c.601 §22]

390.720 [Formerly 274.070; renumbered 390.615]

390.725 Permits for removal of products along ocean shore. (1) No sand, rock, mineral, marine growth or other natural product of the ocean shore, other than fish or wildlife, agates or souvenirs, shall be taken from the state recreation areas described by ORS 390.635, except in compliance with a rule of or permit from the State Parks and Recreation Department as provided by this section. Permits shall provide for the payment of just compensation by the permittee as provided in subsection (5) of this section.

(2) Rules or permits shall be made or granted by the State Parks and Recreation Department only after consultation with the State Fish and Wildlife Commission, the State Department of Geology and Mineral Industries and the Division of State Lands. Rules and permits shall contain provisions necessary to protect the areas from any use, activity or practice inimicable to the conservation of natural resources or public recreation.

(3) On request of the governing body of any coastal city or county, the State Parks and Recreation Department may grant a per-

mit for the removal of sand or rock from the area at designated locations on the ocean shore to supply the reasonable needs for essential construction uses in such localities if it appears sand and rock for such construction are not otherwise obtainable at reasonable cost, and if such removal will not materially alter the physical characteristics of the area or adjacent areas, nor lead to such changes in subsequent seasons. Before issuing a permit the department shall likewise take into consideration the standards described by ORS 390.655. The department may grant a permit to take and remove sand, rock, mineral or marine growth from the area at designated locations. The department shall also issue permits to coastal cities or counties to remove or authorize removal of sand from the ocean shore, under the standards provided by ORS 390.655, if the city or county determines that the sand accumulation on the ocean shore constitutes a hazard or maintenance problem to the city or county.

(4) The terms, royalty and duration of a permit under this section are at the discretion of the department. A permit is revocable at any time in the discretion of the department without liability to the permittee.

(5) Whenever the issuance of a permit under this section will affect lands owned privately, the State Parks and Recreation Department shall withhold the issuance of such permit until such time as the permittee shall have obtained an easement, license or other written authorization from the private owner, which easement, license or other

written authority must meet the approval of the department, except as to the compensation to be paid to the private owner. [1969 c.601 §23]

390.730 [Formerly 274.090; 1969 c.601 §18; renumbered 390.668]

390.735 [1969 c.601 §25; repealed by 1973 c.642 §13]

390.740 [Formerly 274.100; renumbered 390.665]

390.750 [Formerly 274.110; 1969 c.601 §19; renumbered 390.685]

(Vegetation Line)

390.755 Periodical reexamination of vegetation line; department recommendations for adjustment. (1) The State Parks and Recreation Department is directed to periodically reexamine the line of vegetation as established and described by ORS 390.770 for the purpose of obtaining information and material suitable for a re-evaluation and redefinition, if necessary, of such line so that the private and public rights and interest in the ocean shore shall be preserved.

(2) The State Parks and Recreation Department may, from time to time, recommend to the Legislative Assembly adjustment of the line described in ORS 390.770. [1969 c.601 §27; 1979 c.186 §24]

390.760 Exceptions from vegetation line. ORS 390.640 does not apply to any state-owned land or to headlands and other lands located at an elevation of more than 16 feet and seaward of a line running between the following designated and numbered points which are more particularly described by ORS 390.770. The elevation mentioned in this section refers to the United States Coast and Geodetic Survey

Sea-Level Datum of 1929 through the Pacific Northwest Supplementary Adjustment of 1947.

Point Designation and Number		Point Designation and Number	
From	To	From	To
Cl-7-6	Cl-7-7	Cl-7-55	Cl-7-56
Cl-7-10	Cl-7-11	Cl-7-76	Cl-7-77
Cl-7-13	Cl-7-14	Cl-7-115	Cl-7-116
Cl-7-52	Cl-7-53	Cl-7-134	Cl-7-135
Ti-7-3	Ti-7-4	La-7-72	La-7-73
Ti-7-6	Ti-7-7	La-7-87	La-7-88
Ti-7-18	Ti-7-19	Do-8-78	Do-8-79
Ti-7-33	Ti-7-34	Co-7-82	Co-7-83
Ti-7-83	Ti-7-84	Co-7-111	Co-7-112
Ti-7-88	Ti-7-89	Co-7-146	Co-7-147
Ti-7-94	Ti-7-95	Co-7-178	Co-7-179
Ti-7-99	Ti-7-100	Co-7-200	Co-7-201
Ti-7-113	Ti-7-114	Co-7-229	Co-7-230
Ti-7-168	Ti-7-169	Cu-7-25	Cu-7-26
Ti-7-183	Ti-7-184	Cu-7-54	Cu-7-55
Ti-7-249	Ti-7-250	Cu-7-155	Cu-7-156
Li-7-2A	Li-7-3	Cu-7-167	Cu-7-167A
Li-7-10	Li-7-11	Cu-7-167E	Cu-7-168
Li-7-17	Li-7-18	Cu-7-174	Cu-7-175
Li-7-73	Li-7-74	Cu-7-196	Cu-7-197
Li-7-118	Li-7-119	Cu-7-201	Cu-7-202
Li-7-150	Li-7-151	Cu-7-219	Cu-7-220
Li-7-154	Li-7-155	Cu-7-225	Cu-7-226
Li-7-161	Li-7-162	Cu-7-236	Cu-7-237
Li-7-165	Li-7-166	Cu-7-258	Cu-7-259
Li-7-167A	Li-7-168	Cu-7-268	Cu-7-269
Li-7-170	Li-7-171	Cu-7-288	Cu-7-289
Li-7-176	Li-7-177	Cu-7-310	Cu-7-311
Li-7-182	Li-7-183	Cu-7-314	Cu-7-315
Li-7-215	Li-7-216	Cu-7-363	Cu-7-364
Li-7-269	Li-7-270	Cu-7-382	Cu-7-383
Li-7-293	Li-7-294	Cu-7-393	Cu-7-394
Li-7-296	Li-7-297	Cu-7-400	Cu-7-401
Li-7-314	Li-7-315	Cu-7-440	Cu-7-441
Li-7-325	Li-7-326	Cu-7-451	Cu-7-452
Li-7-357	Li-7-358	Cu-7-459	Cu-7-460
Li-7-377	Li-7-378	Cu-7-493	Cu-7-494
Li-7-439	La-7-1	Cu-7-513	Cu-7-514

La-7-9	La-7-10	Cu-7-516	Cu-7-517
La-7-19	La-7-20	Cu-7-538	Cu-7-539
La-7-44	La-7-45	Cu-7-557	Cu-7-558

[1969 c.601 §9]

et. seq.

GOAL

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

To reduce the hazard to human life and property from natural or man-induced actions associated with these areas.

Coastal comprehensive plans and implementing actions shall provide for diverse and appropriate use of beach and dune areas consistent with their ecological, recreational, aesthetic, water resource, and economic values, and consistent with the natural limitations of beaches, dunes, and dune vegetation for development.

INVENTORY REQUIREMENTS

Inventories shall be conducted to provide information necessary for identifying and designating beach and dune uses and policies. Inventories shall describe the stability, movement, groundwater resource, hazards and values of the beach and dune areas in sufficient detail to establish a sound basis for planning and management. For beach and dune areas adjacent to coastal waters, inventories shall also address the inventory requirements of the Coastal Shorelands Goal.

COMPREHENSIVE PLAN REQUIREMENTS

Based upon the inventory, comprehensive plans for coastal areas shall:

1. Identify beach and dune areas; and

2. Establish policies and uses for these areas consistent with the provisions of this goal.

IDENTIFICATION OF BEACHES AND DUNES

Coastal areas subject to this goal shall include beaches, active dune forms, recently stabilized dune forms, older stabilized dune forms and interdune forms.

USES

Uses shall be based on the capabilities and limitations of beach and dune areas to sustain different levels of use or development, and the need to protect areas of critical environmental concern, areas having scenic, scientific, or biological importance, and significant wildlife habitat as identified through application of Goals 5 and 17.

IMPLEMENTATION REQUIREMENTS

1. Local governments and state and federal agencies shall base decisions on plans, ordinances and land use actions in beach and dune areas, other than older stabilized dunes, on specific findings that shall include at least:

   a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;
   b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;

c. Methods for protecting the surrounding area from any adverse effects of the development; and
d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use.

2. Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding. Other development in these areas shall be permitted only if the findings required in (1) above are presented and it is demonstrated that the proposed development:

   a. Is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and
   b. Is designed to minimize adverse environmental effects.

3. Local governments and state and federal agencies shall regulate actions in beach and dune areas to minimize the resulting erosion. Such actions include, but are not limited to, the destruction of desirable vegetation (including inadvertent destruction by moisture loss or root damage), the exposure of stable and conditionally stable areas to erosion, and construction of shore structures which modify current or wave patterns leading to beach erosion.

4. Local, state and federal plans, implementing actions and permit reviews shall protect the groundwater from drawdown which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of salt water into water supplies. Building permits for single family dwellings are exempt from this requirement if appropriate findings are provided in the comprehensive plan or at the time of subdivision approval.

5. Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For the purposes of this requirement and Implementation Requirement 7 "development" means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.

The criteria for review of all shore and beachfront protective structures shall provide that:

a. visual impacts are minimized;
b. necessary access to the beach is maintained;

c. negative impacts on adjacent property are minimized; and
d. long-term or recurring costs to the public are avoided.

6. Foredunes shall be breached only to replenish sand supply in interdune areas, or on a temporary basis in an emergency (e.g., fire control, cleaning up oil spills, draining farm lands, and alleviating flood hazards), and only if the breaching and restoration after breaching is consistent with sound principles of conservation.

7. Grading or sand movement necessary to maintain views or to prevent sand inundation may be allowed for structures in foredune areas only if the area is committed to development and only as part of an overall plan for managing foredune grading. A foredune grading plan shall include the following elements based on consideration of factors affecting the stability of the shoreline to be managed including sources of sand, ocean flooding, and patterns of accretion and erosion (including wind erosion), and effects of beachfront protective structures and jetties. The plan shall:

   a. Cover an entire beach and foredune area subject to an accretion problem, including adjacent areas potentially affected by changes in flooding, erosion, or accretion as a result of dune grading;

   b. Specify minimum dune height and width requirements to be maintained for protection from flooding and erosion. The minimum height for flood protection is 4 feet above the 100 year flood elevation;

   c. Identify and set priorities for low and narrow dune areas which need to be built up;

   d. Prescribe standards for redistribution of sand and temporary and permanent stabilization measures including the timing of these activities; and

   e. Prohibit removal of sand from the beach-foredune system.

The Commission shall, by January 1, 1987, evaluate plans and actions which implement this requirement and determine whether or not they have interfered with maintaining the integrity of beach and dune areas and minimize flooding and erosion problems. If the Commission determines that these measures have interfered it shall initiate Goal amendment proceedings to revise or repeal these requirements.

GUIDELINES

The requirements of the Beaches and Dunes Goal should be addressed with the same consideration applied to previously adopted goals and guidelines. The planning process described in the Land Use Planning Goal

(Goal 2), including the exceptions provisions described in Goal 2, applies to beaches and dune areas and implementation of the Beaches and Dunes Goal.

Beaches and dunes, especially interdune areas (deflation plains) provide many unique or exceptional resources which should be addressed in the inventories and planning requirements of other goals, especially the Goals for Open Spaces, Scenic and Historic Areas and Natural Resources; and Recreational Needs. Habitat provided by these areas for coastal and migratory species is of special importance.

A. INVENTORIES

Local government should begin the beach and dune inventory with a review of Beaches and Dunes of the Oregon Coast, USDA Soil Conservation Service and OCCDC, March 1975, and determine what additional information is necessary to identify and describe:

1. The geologic nature and stability of the beach and dune landforms;

2. Patterns of erosion, accretion, and migration;

3. Storm and ocean flood hazards;

4. Existing and projected use, development and economic activity on the beach and dune landforms; and

5. Areas of significant biological importance.

B. EXAMPLES OF MINIMAL DEVELOPMENT

Examples of development activity which are of minimal value and suitable for development of conditionally stable dunes and deflation plains include beach and dune boardwalks, fences which do not affect sand erosion or migration, and temporary open-sided shelters.

C. EVALUATING BEACH AND DUNE PLANS AND ACTIONS

Local government should adopt strict controls for carrying out the Implementation Requirements of this goal. The controls could include:

1. requirement of a site investigation report financed by the developer;

2. posting of performance bonds to assure that adverse effects can be corrected; and

3. requirement of re-establishing vegetation within a specific time.

D. SAND BY-PASS

In developing structures that might excessively reduce the sand supply or interrupt the longshore transport or littoral drift, the developer should investigate, and where possible, provide methods of sand by-pass.

E. PUBLIC ACCESS

Where appropriate, local government should require new developments to dedicate easements for public access to public beaches, dunes and associated waters. Access into or through dune areas, particularly conditionally stable dunes and dune complexes, should be controlled or designed to maintain the stability of the area, protect scenic values and avoid fire hazards.

F. DUNE STABILIZATION

Dune stabilization programs should be allowed only when in conformance with the comprehensive plan, and only after assessment of their potential impact.

G. OFF-ROAD VEHICLES

Appropriate levels of government should designate specific areas for the recreational use of off-road vehicles (ORVs). This use should be restricted to limit damage to natural resources and avoid conflict with other activities, including other recreational use.

H. FOREDUNE GRADING PLANS

Plans which allow foredune grading should be based on clear consideration of the fragility and ever-changing nature of the foredune and its importance for protection from flooding and erosion. Foredune grading needs to be planned for on an areawide basis because the geologic

processes of flooding, erosion, sand movement, wind patterns, and littoral drift affect entire stretches of shoreline. Dune grading cannot be carried out effectively on a lot-by-lot basis because of these areawide processes and the off-site effects of changes to the dunes.

Plans should also address in detail the findings specified in Implementation Requirement (1) of this Goal with special emphasis placed on the following:

- Identification of appropriate measures for stabilization of graded areas and areas of deposition, including use of fire-resistant vegetation;

- Avoiding or minimizing grading or deposition which could adversely affect surrounding properties by changing wind, ocean erosion, or flooding patterns;

- Identifying appropriate sites for public and emergency access to the beach.